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MICHAEL ROD

IN THE

Supreme Court of the United States

October Term 1973

NO. 73-1620

JOHN R. BROWN, SR., M.D.,
Petitioner

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT	2
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES

	Page
Brusca v. State of Missouri, 332 F.Supp. 275 (E.D. Mo. Three Judge Court, 1971), aff'd 405 U.S. 1050, 92 S.Ct. 1493 (1972)	5, 7
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 21 L.Ed.2d 80 (1957)	3
Cornwell v. State Board of Education, 314 F.Supp. 340 (D. Md. 1969), aff'd. 428 F.2d 471 (4th Cir.) cert. denied 400 U.S. 942, 91 S.Ct. 240 (1970)	5, 7
Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968)	4, 5
Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969)	3
Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971)	6, 7
Wright v. Houston Independent School District, 486 F.2d 137, 138	4

CONSTITUTIONAL PROVISIONS

	Page
United States Constitution:	
First Amendment	4, 5
Fourteenth Amendment	4

RULES

	Page
Fed. R. Civ. P. 12(b)(6)	2, 3, 5

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BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (Petitioner's Appendix A) is not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix D) is reported at 486 F.2d 137.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether Petitioner failed to state a claim upon which relief can be granted.

Statement

The original Plaintiffs sought to enjoin the Houston Independent School District (District) and the State Board of Education from teaching the theory of evolution as a part of the District's academic curriculum and from adopting textbooks which present the theory without critical analysis and to the exclusion of other theories regarding the origins of man. Subsequently, Petitioner was permitted to intervene. The District Court, after notice and hearing, granted the District's Motion to Dismiss for Failure to State a Claim upon Which Relief Can be Granted made pursuant to Fed. R. Civ. P. 12(b)(6). The Court of Appeals for the Fifth Circuit in a Per Curiam Opinion affirmed the Opinion of the District Court.

Argument

There are no special or important reasons for a review on Writ of Certiorari. The decision of the Court of Appeals is not in conflict with a decision of any other court of appeals nor with applicable decisions of this Court. Further, no important question of federal law has been raised. Petitioner merely complains because the courts below held that he had failed to state a claim on which relief can be granted, citing the holdings of this Court,

which set forth the circumstances under which a dismissal pursuant to Rule 12(b)(6) is proper, *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 21 L.Ed.2d 80 (1957), *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The courts below properly applied the *Conley* and *Jenkins* tests to the relief sought. It appears beyond doubt that Petitioner can prove no set of facts in support of his claim which would entitle him to relief even when the material allegations of the Complaint are taken as admitted.

The original Plaintiffs sought the following relief in the District Court:

> "WHEREFORE, Plaintiffs pray for an injunction permanently enjoining Defendants, Houston Independent School District and all other Defendants, from continuing to teach the theory of evolution in any manner in any of the schools of said public school system and from selecting, supplying and using text books that present the theory without a concomitant critical analysis and to the exclusion of other theories, such as the creation theory, regarding the origin of man, and from selecting, supplying and using books to teach the evolutionary theory without a concomitant critical analysis and to the exclusion of other theories regarding the origin of man." Plaintiffs' Second Amended Application for Permanent Injunction (R. 372-378)

Subsequently, Petitioner intervened and adopted Plaintiffs' Second Amended Application for Permanent Injunction. In addition, Petitioner sought the following relief:

> "WHEREFORE, premises considered, Intervening Plaintiffs pray for an injunction permanently enjoining the Defendant Houston Independent School Dis-

> trict and all other Defendants from continuing to teach the theory of evolution in any manner of teaching, discussing, supplying and using textbooks in any manner that presents the theory of evolution in the manner specifically pled in paragraph V, Points 1 through 9, and therefore would pray for such remedies of the court that neither violate the First Amendment Doctrine of Neutrality and the Fourteenth Amendment in theory nor has the practical effect of violating the theory of neutrality, or in the alternative should the theory of evolution be taught, that the Court place such safeguards upon the teaching that it is taught with a critical analysis and that the other scientific alternatives and evidences be taught also." (R. 69-74)

Thus, the very relief sought by Petitioner, if granted, would be violative of the Constitution of the United States. *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266 (1968). There, this Court struck down a statute which prohibited the teaching of evolution in the Arkansas public schools. Just as this Court held that the anti-evolution law is contrary to the mandate of the First and in violation of the Fourteenth Amendment to the Constitution, so would be the result if the relief sought by Petitioner were granted. As held by the Court of Appeals below, federal courts cannot by judicial decree do that which the Supreme Court has declared the state legislatures powerless to do, i.e., prevent teaching of the theory of evolution in public schools for religious reasons. *Wright v. Houston Independent School District,* 486 F.2d 137, 138.

In *Epperson* this Court held that the state's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or

doctrine where the prohibition is based upon reasons that violate the First Amendment. Surely, in prescribing the curriculum for its public schools, a state should not be prohibited by judicial decree from the teaching of a scientific theory where the prohibition would violate the First Amendment.

Since *Epperson v. Arkansas, supra,* this Court has had an opportunity to consider two cases involving public school curriculum and the First Amendment. *Brusca v. State of Missouri,* 332 F. Supp. 275 (E.D. Mo. Three Judge Court, 1971), aff'd. 405 U.S. 1050, 92 S.Ct. 1493 (1972), and *Cornwell v. State Board of Education,* 314 F. Supp. 340 (D. Md. 1969), aff'd. 428 F.2d 471 (4th Cir.) cert. denied 400 U.S. 942, 91 S.Ct. 240 (1970). Both were dismissed for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6).

The plaintiffs in *Cornwell* sought to enjoin the operation of a comprehensive program of family life and sex education conducted in the Baltimore county schools. They urged that the sex education program denied them the free exercise of their religious concepts, and that the teaching of sex in the educational context establishes religious concepts in violation of the First Amendment. The District Court determined there was no substantial constitutional claim, holding:

> "Applying these principles that have been established by these various cases is quite clear to this Court that the purpose and primary effect of the by-law here is not to establish any particular religious dogma or precept in that the by-law does not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion." 314 F. Supp. 340, 344.

In affirming, the Court of Appeals for the First Circuit considered the dismissal of the action for failure to state a claim upon which relief can be granted:

> "The District Court in construing the allegations in the light most favorable to the plaintiffs held that the constitutional challenge lacks merit. We agree and for the reasons stated by the District Court we affirm its dismissal of the action." 428 F.2d 471, 472.

In *Brusca v. State of Missouri, supra,* a three judge panel dismissed an action by taxpayers asserting the invalidity of the Missouri Constitution and statutes which establish and provide for the funding of a free public school system and which prohibit the use of public funds to directly or indirectly aid religious or sectarian schools. There the court found:

> "It is crystal clear from the amended complaint (and from plaintiff's briefs in opposition to the motion to dismiss) that the 'precise' reason parent-plaintiffs demand state aid in this case is to enable them to obtain a religious education for their children."

In the case *sub judice,* Petitioner seeks to obtain a religious education for his children in the schools of the District. The panel cited this Court's decision in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971), as the most recent pronouncement and one which forecloses any possibility of granting the relief sought by Plaintiffs. The Court applied the *Lemon* tests and held that "In the present case, in which Plaintiffs demand, as a matter of right, state aid for the very purpose of enabling them to give children an adequate religious education in sectarian schools, any plan to achieve that end would necessarily have a non-secular legislative purpose and thus fail

to meet the first test." For the same reasons, the relief sought by Petitioner herein fails to pass the *Lemon* test. Indeed, it fails on all three criteria: First, that it have a secular legislative purpose; second, that its principal or primary effect be one that neither advances nor inhibits religion; third, it must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman,* 91 S.Ct. 2105, 2111.

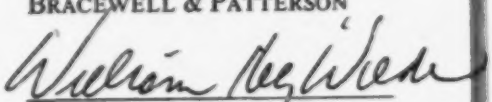
As in *Cornwell v. State Board of Education, supra,* and *Brusca v. State of Missouri, supra,* any possibility of granting the relief sought by Petitioner has been foreclosed. The relief sought is proscribed by the Constitution of the United States. Petitioner's complaints do not state a claim upon which relief can be granted and were properly dismissed.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRACEWELL & PATTERSON



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May 20, 1974

CERTIFICATE OF SERVICE

Three true and correct copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari have been served on Herbert L. Coffman, attorney for Petitioner John R. Brown, Sr., M.D., by mailing copies of same by United States mail with sufficient postage thereon to Herbert L. Coffman, 5757 Bellaire Blvd., Suite 203, Houston, Texas 77036, and on the State Board of Education and the Central Education Agency by mailing copies of same by United States mail with sufficient postage thereon to Bruce Youngblood, Assistant Attorney General of Texas, Box 12540, Capitol Station, Austin, Texas.

William Key Wilde

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